

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
GUIDELINES FOR USE OF MONARCH CONSTITUENT MANAGEMENT SYSTEM

The City Manager has asked us to provide guidelines to the Mayor and Council for use of the Monarch Constituent Management System (Monarch System), which San Diego Data Processing Corporation (SDDPC) has been asked to install in some Council offices. The following provides you with a brief outline of the legal limits on the use of this software; however, it is not a definitive statement of all laws governing the use of this type of computer software. Please do not hesitate to ask our office for advice if you have specific questions.

I. Background Information:

According to information supplied by SDDPC, the Monarch System has both a "legislative" and "campaign" package. The system proposed for installation in Council offices is the "legislative" package. This "legislative" package was initially developed for use by California State Legislative offices, but has been adapted for use by local elected officials. The "legislative" package has the capacity to store different types of information from that stored by the "campaign" package.

According to Chris Crotty, Administrative Assistant to Assemblywoman Killea, the Monarch Legislative System has been installed and has been operational for years in State Legislative offices. There has been no formal legal opinion on its use issued by Legislative Counsel. According to Mr. Crotty, the system is used primarily for tracking constituent mail; to a lesser extent it is used for direct mailings. The legislative offices monitor themselves for compliance with Proposition 73 "mass mailing" rules.

II. Types of Data that Will be Collected and Stored:

It is our understanding that the Monarch System Legislative package will contain information taken primarily from voter registration cards housed by the County Registrar of Voters when

the system is first installed. According to Election Code section 511.5, information contained in voters' registration cards is public information. The voter registration cards generally contain the following information: voter's full name (with or without designation of "Mr.," "Ms.," etc.); voter's residence; voter's residence telephone, if furnished; voter's mailing address if different from residential address; voter's

date and state or country of birth; voter's occupation; voter's political party affiliation, if furnished; a statement that voter is not imprisoned or on parole for conviction of a felony; and a statement of whether voter has registered previously and, if so, at what address. Election Code sections 500 and 501.

There is also room to add information about particular voter's special interests, based on information elected officers have received independently from the registrar's records, for example, from constituent letters or phone calls. In fact, the apparent main advantage of the Monarch System is the capacity to enter the special interest information about individual voters for future reference.

In contrast with the "legislative" package, the "campaign" package permits entering and storing information regarding a voter's race, religious preference, ethnic-background, etc. Although it is not illegal to be aware of this information, how that information could be used might pose legal problems. Since this information will not be available in the legislative package, we will discuss the potential abuses and legal problems associated with abuse of this information only briefly below.

III. Ownership of Data Collected: City or Councilmember?

It is our understanding that City funds are being used to purchase and install the Monarch System and that City staff will maintain and update the information in the database. Therefore, the Monarch System and the information it will contain will be City property.

The Council's Code of Ethics, as embodied in Council Policy No. 000-4, prohibits a public official or employee from engaging in any activity which results in

. . .

- (b) Using time, facilities, equipment, or supplies of The City of San Diego for the private gain or advantage of himself or another.

- (c) Using official information not available to the general public for his private gain or advantage or that of another.

This policy would prohibit individual Councilmembers from "loaning" the information maintained in the Monarch System to a campaign committee or to someone for their private use.

IV. Limits on Potential Uses of the Data Collected.

A. Public Purpose Doctrine:

Since the Monarch System will be purchased and maintained with City funds, the constitutional limits

applicable to the uses for City funds generally will apply here. The California Constitution requires that public funds be used for public purposes. The concept of "public purpose" is liberally construed by the courts. However, the purposes advanced as justifications for expenditures are scrutinized closely by the courts to determine whether there is any reasonable basis for the expenditure, i.e., that it is not arbitrary. See, e.g., *Mannheim v. Superior Court*, 3 Cal. 3d 678, 691 (1970).

Although we found no case on point, keeping track of constituents' needs, desires, and voting patterns would appear to be reasonably related to a public purpose. However, if the information collected were solely to benefit an individual or campaign, the "public purpose" of the data collection and maintenance would be defeated.

B. Selling and Leasing Data Collected.

1. Public Records Act:

The software of the Monarch System Legislative package may be sold, leased or licensed for commercial or non-commercial uses under the terms of the Public Records Act (Government Code section 6254.9(a)) even though the program is not a public record. However, if the only reason for the Monarch System's purchase, development, and maintenance is to resell or lease it, for example, to a campaign committee, the "public purpose" of the City's expenditures for purchase, development and maintenance would probably be defeated.

Note that since the Monarch System and the database developed with its use will be purchased and developed with City funds, the City Council as a whole, not

individual councilmembers, must decide whether to sell, lease, license or otherwise dispose of either the system or the information collected with its use.

2. Contractual Limitations:

According to the users' manual of the Monarch System we reviewed, no part of the software program may be copied or reproduced except under the terms and conditions of the contract between SDDPC and the producers of the Monarch System. Therefore, although the Public Records Act may purport to allow sale or lease of the software program, before sale or lease occurs, the contract between SDDPC and Monarch should be reviewed.

C. Discrimination in Use of Data:

As we pointed out above, the legislative package of the Monarch System as currently offered does not permit storage of information regarding race, religion, alienage, etc. However, if the program is altered at some future date to permit collection of data identifying "protected classes" of individuals within the meaning of the United States Constitution, amendment XIV (e.g., race, religion or alienage), and of other classes of individuals protected by statute (e.g., gender, ancestry, physical handicap, medical condition, or marital status), councilmembers should be sensitive as to how the information gathered will be used. There is no outright prohibition against collecting and maintaining this type of data, but the Council should exercise caution in its use.

V. Access by Public and Press to Data Collected:

According to 1988 amendments to the Public Records Act, computer software developed by a state or local agency is not itself a public record and a state or local agency may sell, lease or license the software for commercial or noncommercial use. Government Code section 6254.9(a). However, this same statute states that nothing in the statute is "intended to affect the public record status of information merely because it is stored in a computer. Public records stored in a computer shall be disclosed as required by . . ." the Public Records Act (Government Code section 6254.9(d)). Therefore, any information contained in the Monarch System is subject to the Public Records Act and will be open to inspection for the press and public, unless some aspect of it qualifies for a specific exception,

e.g., litigation matters or real property negotiations involving the City.

The public, including a candidate running for City office, will have a right to inspect whatever is in the database developed by each of the Council offices. Requests for information contained in the Monarch System should be handled in the same manner as any other request for a public record in accordance with Administrative Regulation 95-20, as amended on February 21, 1989 (copy attached).

V. Use of Data Collected for Mass Mailings - Proposition 73

Restrictions:

In June 1988, California voters adopted Proposition 73, which in part places severe restrictions on "mass mailings" (200 or more substantially similar documents) by elected officials at public expense. The Fair Political Practices Commission (FPPC)

has adopted Regulation 18901 which implements the mass mailing restrictions of Proposition 73. A copy of that regulation, effective as of November, 1989, is attached for your convenience. Essentially this regulation prohibits distributing 200 or more unsolicited newsletters or other mass mailings within one calendar month at public expense. There are several exceptions. Under current interpretations of their own rule, the FPPC does allow cities to pay for mass mailings and to be reimbursed for those mass mailings later, as long as the reimbursement covers all the costs of the mass mailing. Therefore, if the Monarch System is used to prepare "mass mailings," the City must be reimbursed fully for the staff and use of the system to prepare the mailings.

Please note that the FPPC is considering adoption of major changes to Regulation 18901 at its December 13, 1989, hearing. The proposed new rule has so many alternatives for the FPPC to consider that repeating the proposed new rule here would only be confusing and probably misleading. We will advise you when the new rule is adopted.

CONCLUSION

Before using the new Monarch constituent tracking system, we suggest you review these legal guidelines to ensure proper use of the system. If you have specific questions, please do not hesitate to call our office.

Respectfully submitted,
JOHN W. WITT
City Attorney

CCM:skc:jrl:180.1(x043.1)

Attachments (A.R. 95-20; FPPC Reg. 18901)

cc Charles G. Abdelnour, City Clerk

Robert Metzger, Executive Vice President

San Diego Data Processing Corporation

RC-89-54